No. 16521.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH B. JOHNSON,

Appellant,

vs.

CHARLES B. MACCOY,

Appellee.

APPELLANT'S OPENING BRIEF.

MARVIN ZINMAN,
315 West Ninth Street,
Los Angeles 15, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdictional Statement.

1. Jurisdiction in the District Court.

The District Court had jurisdiction of this action by virtue of the provisions of Section 1983, Title 42, United States Code (which section is a part of an act commonly called the Civil Rights Act) in that the complaint alleged the violation of a right in the plaintiff protected by the Fourteenth Amendment to the United States Constitution [R. 8] by one *i.e.,* the defendant, acting under color of the law and office of a State [R. 4]. While there has been some confusion as to the existence of jurisdiction in the District Court under these allegations, it now seems clear that these allegations do give the District Court jurisdiction, *Walton v. City of Atlanta,* 181 F. 2d 693 (C. A. 5, 1950); *Oppenheimer v. Stillwell,* 132 Fed. Supp. 761 (D. C. Cal., 1955) (denying a motion to dismiss for lack of jurisdiction; granting a motion to dismiss on immunity grounds).

2. Jurisdiction of the Court of Appeals to Review the Judgment of the District Court.

This Court has jurisdiction to review the judgment of the District Court by virtue of Section 1291, Title 28, United States Code, in that a final judgment was entered by said Court on April 30, 1959 [R. 15, 16] from which notice of appeal was served and filed on May 15, 1959 [R. 17]. The record [R. 16, 17] reflects that a notice of appeal was also served and filed on April 24, 1959; said notice was protective only and pertained to the District Court's order granting motion to dismiss [R. 14, 15], filed March 27, 1959 and which preceded the judgment, as aforesaid.

Statement of the Case.

This is an action under Section 1983, Title 42, United States Code, the Civil Rights Act, to redress an alleged violation of rights protected by the Fourteenth Amendment to the United States Constitution [R. 8]. Money damages are sought [R. 8]. The defendant moved to dismiss the complaint on the ground that the complaint failed to state a claim for relief [R. 13, 14]. Said motion was granted; no reasons for the granting thereof were given and no written opinion was filed [R. 14, 15]. Plaintiff chose to stand upon her complaint and this appeal followed.

In the view of counsel for plaintiff, the motion to dismiss was granted because the District Court held the view that the defendant had an immunity from the claim stated in the complaint. Accordingly, the question on this appeal is whether the defendant did have an immunity from suit under the allegations of the complaint cognizable by motion to dismiss.

Specification of Error.

Appellant contends that the District Court erred in granting the motion to dismiss.

ARGUMENT.

While Defendant as a Judicial Officer Has a Broad Immunity From Suit, an Exception to This Immunity Does Exist Which Is Applicable Here.

The complaint alleges that the defendant is a judicial officer [R. 4] and admittedly as such he has a broad immunity from suit. *Bradley v. Fisher,* 80 U. S. 355 (1871). However, an exception to the rule of immunity does exist which should have been applied by the District Court to the complaint before it. Said exception is best set forth in the case most often cited for the proposition that the immunity exists, *Bradley v. Fisher, supra,* as follows:

> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Said exception to the rule of immunity has been more recently recognized and is still the law. *Kenney v. Fox,* 232 F. 2d 288 (C. A. 6, 1956); *Ryan v. Scoggin,* 245 F. 2d 54 (C. A. 10, 1957).

An examination of the complaint shows that the exception to the rule of immunity was alleged therein. Indeed such examination shows that the pleader had the immunity rule and the exception thereto in mind in drafting

the complaint. If the allegations as to the exception in the complaint are not sufficient, it must be said that no complaint at all can ever be drafted so as to litigate the issue of whether the exception to the rule should apply. The writer of this brief concedes that allegations of malice, ill will and bad faith are not sufficient to pierce the immunity which a judicial officer enjoys, and this complaint does not contain allegations of malice and ill will, although there is an allegation of bad faith [R. 7] material for reasons other than that of pleading the exception to the rule of immunity. The writer, who also drafted the complaint, does however believe that there are allegations in the complaint sufficient at least to allow the issue to be litigated beyond the pleading stage.

It is noted that the complaint alleges that the defendant first, on October 28, 1957, issued a felony complaint charging plaintiff with the violation of a crime and that he then caused a warrant to be issued for her arrest [R. 4, 5]. This first felony complaint and warrant were not issued in accordance with the law of California and it is alleged that the same did not result from action of the part of the regular prosecutive agencies of the State, nor of a grand jury thereof [R. 5]. The proceedings so commenced were shortly dismissed by defendant's brother judge who, in so doing, gave an opinion from the bench in which he held that the defendant did not have any jurisdiction to do as he did. This opinion was reported; it is a part of the complaint [R. 5, 9, 10, 11, 12, 13]; and the complaint alleges that defendant knew of this ruling and opinion when he acted a second time [R. 6].

Appellant concedes that had the appellee stopped with the first complaint and warrant, she probably could not have pierced his immunity. The complaint does not rely

on these first acts to come within the exception. It is when he acted a second time [R. 5, 6], with knowledge of the prior dismissal [R. 6], that the immunity he otherwise enjoys, for pleading purposes at least, was denied to him.

The pleader attempted to plead, as the rules of pleading require, Rule 8, Federal Rules of Civil Procedure, the "ultimate facts" as to the exception as well as to the remainder of the claim for relief. The complaint contained the allegation that the defendant "did an act of an official nature in the clear absence of any color of jurisdiction to act" [R. 7]. The purpose of this allegation was to clearly call the exception into play and the allegation is based directly on the rule announced in *Bradley v. Fisher, supra.* It is submitted that this allegation does not fall within the same class as allegations of malice and ill will *i.e.,* formula allegations to defeat immunity, but is instead an allegation of an ultimate, though mixed, fact which under *Bradley v. Fisher* is operative to allow the case to come to issue.

Conclusion.

It is submitted that even a judicial officer may, under one circumstance at least, lose his immunity from suit. That circumstance is where he acts in the clear absence of jurisdiction with the knowledge that he is without jurisdiction to act. This complaint alleges this circumstance and the District Court erred in granting the motion to dismiss because of it.

Respectfully submitted,

Marvin Zinman,

Attorney for Appellant.